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No. 84-784

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS P. TRACEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Appeal From the United States Court of Appeals
For the First Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER FRANCIS P. TRACEY

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Argument

Pursuant to Rule 22, subsection .6, Petitioner, Francis P. Tracey, *pro se*, files a supplemental brief as provided by the Rules of the Supreme Court. The fundamental principle of a petition for a writ of habeas corpus is that "government must always be accountable to the judiciary for a man's imprisonment" and that the restraints on liberty must be removed if the imprisonment does not conform to the basic requirements of

law. *Fay* v. *Noia*, 372 U.S. 391, 401-402, 83 S.Ct. 822, 829, 9 L.Ed.2d 837 (1963). When the facts alleged in a habeas petition would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied, the District Court must grant an evidentiary hearing. *Willis* v. *Ciccone*, 506 F.2d 1011, at 1016, 1019 (8th Cir. 1974). The instant petition and motions and affidavits accompanying thereto, set forth sufficient facts to permit the inference that petitioner, Francis Tracey, had been denied due process. See also, *Preiser* v. *Rodriguez*, 411 U.S. 475 at 484, 93 S.Ct. 1827 at 1833, 36 L.Ed.2d 439 (1973).

A petition is cognizable in habeas corpus when it alleges a denial of due process resulting in a claim of illegal detention by arbitrary government action. See, *Wilwording* v. *Swenson*, 502 F.2d 844, 847-48 (8th Cir. 1974). To be sufficient, the petition must describe a substantial infringement of a constitutional right and a factual statement which, if true, would entitle the petitioner to relief, as in the instant petition. See also, *Preiser* v. *Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439. This Court has set guidelines wherein an evidentiary hearing is required for state petitioners, the lead case being, *Townsend* v. *Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). The instant petition would clearly qualify under *Townsend* guidelines as such.

The district court did not hold an evidentiary hearing in the instant case. An evidentiary hearing is required, as indicated, if there is a dispute of material fact—that is, facts which if true, would entitle the petitioner to relief—and your petitioner, Francis Tracey, was not afforded even a hearing by a magistrate, let alone a full and fair evidentiary hearing in the court below. Congress, and rightly so, has clearly set forth in the § 2255 Rules that a § 2255 petitioner is not required to present his proof fully in his habeas petition and affidavits, but is entitled to present his proof at a full and fair hearing before the district court. This is of greater import in the instant case wherein petitioner is not confined in Federal Prison but resides

in the immediate area of the district court below, and thusly would not have to be transported to the district court at Government expense. See *Procunier* v. *Atchley*, 400 U.S. 446, 451, 91 S.Ct. 485, 488, 27 L.Ed.2d 524 (1971); see also *Patterson* v. *Cuyler*, 729 F.2d 925 (3rd Cir. 1984); see also, *Townsend* v. *Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963).

This Court in *Sunal* v. *Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947), at page 180 in 332 U.S., 67 S.Ct. at page 1591, quoting Chief Justice Hughes in *Bowen* v. *Johnston*, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455, said: "***the rule which requires resort to appellate procedure for the correction of errors 'is not one defining power but one which relates to the appropriate exercise of power.'" Therefore, the Court continued, the rule is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." A "very tentative classification of categories in which *habeas corpus* has not been deemed beyond the power of federal courts to entertain" is to be found in Mr. Justice Frankfurter's dissenting opinion in *Sunal*.

In the instant case, the Government knowingly allowed perjured testimony to be admitted by the Government's one and only 'key' and 'crucial' prosecution witness. Further, the Government granted said witness 'pocket-immunity', which immunity was not revealed to the jury, and had the jury known that the Government's 'key' prosecution witness was granted immunity, the jury might have reached a different verdict.

In 1942, prior to the adoption of the Federal Rules of Criminal Procedure, a unanimous Supreme Court held that the deliberate suppression by authorities of evidence favorable to a defendant violates due process. *Pyle* v. *Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 178, 87 L.Ed. 214 (1942). The *Pyle* v. *Kansas* rule was uncomplicated, and it was applied in a

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relatively straightforward manner. It was not limited to the use of perjured testimony or to instances in which a request for exculpatory evidence was made. See *United States ex rel. Ameida* v. *Baldi*, 195 F.2d 815, 820 (3rd Cir. 1952) (state's failure to disclose ballistics evidence helpful to defense), *cert. denied*, 345 U.S. 904 (1953); *United States* v. *Rutkin*, 212 F.2d 641, 644-45 (3rd Cir. 1954) (federal failure to disclose statement of a potentially useful defense witness); *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, 765 (3rd Cir.) (state failure to disclose evidence of defendant's intoxicated condition at time of arrest), *cert. denied*, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955). This court in *Brady* v. *State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), has held that suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

In *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 104 (1972), this Court held that nondisclosure of a promise of leniency made to a key witness was material, since it could have affected the jury's assessment of that witness' testimony. This is exactly the situation in the instant case as pleaded in petitioner's habeas affidavits. "A new trial is required," wrote Chief Justice Burger, if " 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' ", *Giglio* v. *United States*, 405 U.S. at 154, 92 S.Ct. at 706, quoting *Napue* v. *Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959). Significantly, in *Giglio* the Supreme Court made no mention of the request feature of Justice Douglas' *Brady* formulation.

Most federal courts now hold that the disclosure obligation—(now generally identified as a *Brady*")—existed even in the absence of a request. See *United States* v. *Hibler*, 463 F.2d 455, 459 (9th Cir. 1972); *Levin* v. *Clark*, 408 F.2d 1209, 1210-12 (D.C. Cir. 1968); *United States* v. *Poole*, 379 F.2d 645, 649 (7th Cir. 1967); *Levin* v. *Katzenbach*, 363 F.2d 287,

290 (D.C. Cir. 1966); *Barbee* v. *Warden*, 331 F.2d 842, 845-46 (4th Cir. 1964); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 137 (2d Cir. 1964); *Simms* v. *Cupp*, 354 F. Supp. 698, 700-01 (D. Ore. 1972); *Clements* v. *Coiner*, 299 F. Supp. 752, 758 (S.D. W.Va. 1969); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968).

These matters stood when this Court decided *United States* v. *Augurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Augurs*, a federal prosecutor defended his failure to disclose the criminal record of the victim of a homicide on the ground that there had been no specific request for it. The Circuit Court for the District of Columbia Circuit, holding that the information was nevertheless relevant to the defendant's self-defense theory, ordered a new trial. Before this Court, the United States took the position that *Brady* and *Moore* had narrowed *Pyle* by making a specific request a prerequisite to the prosecutor's due process obligation to disclose material favorable to the accused. Brief for Petitioner at 24-33, *United States* v. *Augurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This position the Court rejected, thereby rehabilitating that portion of *Pyle* v. *Kansas* holding that the prosecutor has a duty to the accused, even in the absence of a request. However, the *Augurs* Court refined the materiality requirement, developing for the first time a three-level test for materiality depending on whether a request has been made.

Under *Augurs*, if the prosecutor knew or should have known of perjured testimony, whether or not a request has been made, then the disclosure of this fact is required by due process if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Augurs*, 427 U.S. at 103, 96 S.Ct. at 2397, 49 L.Ed.2d 342 (1976). This is the situation in the instant case of your Petitioner, Francis Tracey.

The standard for the use of perjured testimony, derived from *Giglio*, is similar to, and evidently more lenient than, the

well-known Rule 33 standard applicable to perjured testimony enunciated in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928) (whether the jury "might have reached a different conclusion"). See, *Giglio* v. *United States*, 405 U.S. 154, 92 S.Ct. 706. See also, *United States* v. *Meyers*, 484 F.2d 113, 116 (3rd Cir. 1973); *Newman* v. *United States*, 238 F.2d 861, 892 n.1 (5th Cir. 1956); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949); *United States* v. *Flynn*, 131 F. Supp. 742, 743 (S.D.N.Y. 1955); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y. 1952).

The Third Circuit, in *United States* v. *Oxman*, 740 F.2d 1298 (1984), has held that because the prosecutor withheld specifically requested information concerning immunity agreement that might have been used to impeach significantly government witness who incriminated defendant in tax fraud (excise tax), which is identical to the instant case of your Petitioner, Francis Tracey, and because nondisclosure was not harmless beyond a reasonable doubt inasmuch as witness rebutted defendant's defense, defendant was entitled to a new trial.

Generally prosecutorial misconduct is reducible to certain specific errors which arguably may have prejudiced the defendant. Thus, courts have ordered new trials when the prosecution has knowingly used perjured testimony, as in the instant case. See *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 8, 408 F.2d 1209, 1211 (1967).

In *Levin*, Judge Bazelon stated:

> "The rationale of these cases (concerning the knowing use of perjured testimony) seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated."

Quoting District Judge Winner in *United States* v. *Kilpatrick*, 570 F. Supp. 505 (1983):

> "In recent years, the use of "pocket-immunity" has become prevalent. The phrase, for the benefit of the uninitiated, refers to a practice of ignoring the Congressional mandate as to how immunity can be granted and instead of doing what Congress commands, informally substituting a "deal" struck between a prosecutor and a witness."

Further, "not important, of course, is the fact that the pocket immunity need not be included in statistical reports showing the number of immunities granted in federal prosecutions." The history of immunity statutes is set out in footnotes to *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The record in the instant case shows that the Government's 'key' and 'crucial' prosecution witness Francis X. Green denied on both direct and cross-examination that he had been granted immunity by the Government, even though he had "pocket-immunity" in a 'deal' with the United States Attorney.

Conclusion

For reasons of the foregoing arguments and authorities, and based upon the facts of this case and the arguments and authorities set forth in Petitioner Francis Tracey's pending Petition for A Writ of Certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted or in the alternative, whatever relief the Court deems fit to grant.

Respectfully submitted,

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